Supreme Court, U.S.
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No. 05-115

In The

Supreme Court of the United States

DANNY THOMAS RYAN,

Petitioner,

vs.

JOAN PALMATEER, Superintendent,
Oregon State Penitentiary,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a criminal prosecution, a constructive denial of the Sixth Amendment right to counsel occurs when defense counsel fails to subject the government's case to "meaningful adversarial testing." The question presented is whether such a failure occurs where:

1. Defense counsel is ignorant of fundamental rules of criminal procedure;
2. Defense counsel lacks rudimentary litigation skills; and
3. Defense counsel commits serious errors in every phase of a trial, ranging from pre-trial preparation to post-trial motions.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Danny Thomas Ryan respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court in *Ryan v. Palmateer*, SC No. S51169. (March 10, 2005).

OPINIONS BELOW

The opinion of the Oregon Supreme Court is reported at 338 Or. 278, 108 P.3d 1127 (2005), and is attached to this petition as App. 1-28. The order of the Oregon Court of Appeals is reported at 190 Or. App. 398, 79 P.3d 916 (table) (2003), and is attached to this petition as App. 41. The trial court's findings of fact, conclusions of law, and judgment are not reported and are attached to this petition as App. 29-40.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1257(a). The judgment of the Oregon Supreme Court was entered on April 19, 2005, and is attached to this petition as App. 42-43. This petition is filed within the 90-day period following the entry of judgment as prescribed by 28 U.S.C. § 2101(c) and Rule 13(3) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

I. Statement of the Facts

A. Introduction

This case stems from an alleged sexual assault by petitioner, Danny Ryan, on a former girlfriend, Helen Adams. Ryan and Adams were involved in an intimate relationship during the latter half of 1995 and the first half of 1996. At one point during this period the two discussed the possibility of marriage. However, the relationship began to deteriorate when Adams learned that Ryan had contacted a former girlfriend. The deterioration ultimately led to a split-up. The split-up became acrimonious when Adams started dating Ryan's best friend while she was still in the process of severing her relationship with Ryan. (Trial Transcript ("Tr.") 227-232; 477-478).[1]

Ryan invited Adams to come to his home on September 12, 1996, in order to say goodbye and to make a "clean break" of their relationship (Tr. 234). According to Adams, once she was inside Ryan's home, he threatened her with a

[1] All trial court transcript references are to the underlying criminal proceeding. The transcripts were entered into evidence in the post-conviction proceeding.

rifle and forced her to perform sodomy (Tr. 243). Ryan categorically denies that any sexual assault occurred (*see, e.g.*, Tr. 499). Ryan was charged with eight offenses based on this incident, and was convicted by the jury of all but one.[2] Ryan did not take a direct appeal from his judgment of conviction. Instead, he elected to collaterally attack his conviction by means of a petition for post-conviction relief.

Ryan claims that his trial attorney failed to subject the prosecution's case to meaningful adversarial testing, thus giving rise to the constructive denial of counsel under *U.S. v. Cronic*, 466 U.S. 648 (1984).

B. Chronological Review of Trial Counsel's Performance

Initial Representation

Attorney Shari Perlman was initially appointed to represent Ryan on these charges. She entered a not guilty plea, advocated for Ryan's release, began doing investigative work, and filed motions challenging the application of Oregon Ballot Measure 40[3] and Oregon Ballot Measure 11.[4] Ryan then retained attorney Daniel Russell ("trial counsel"), on the assumption that retained counsel would furnish superior representation. Ironically, the judge who tried the underlying criminal case ("trial judge"), stated that

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[2] The eight offenses were Attempted Rape, Sodomy, Menacing (three counts), Witness Tampering (two counts), and Theft in the Third Degree.

[3] Measure 40 made extensive changes in every phase of a criminal prosecution. It was held unconstitutional in *Armatta v. Kitzhaber*, 327 Or. 250, 959 P.2d 49 (1998).

[4] Measure 11 imposed lengthy mandatory minimum sentences for specified felonies.

trial counsel lacked the expertise needed to qualify to be on the court appointment list for serious cases (Ex. 5, p. 95).[5] Indeed, the trial judge stated that trial counsel did "the poorest job of any trial lawyer I have observed in [my] 30 years on the bench." (Ex. 2, p. 5).

Pre-trial Investigation: Stephen Taylor, the defense investigator, had virtually no contact at all with trial counsel. Instead, trial counsel used his law clerk as an intermediary (Ex. 3, pp. 6-7; Ex. 4, p. 3). The relationship between Taylor and trial counsel was so tenuous that Taylor was not even certain that his investigative reports had been received (Tr. 417). In addition, trial counsel never solicited Taylor's views concerning the nature of the investigation that was appropriate in the case (Ex. 3, p. 7). Taylor summarized his relationship with trial counsel in the following terms: "My contacts with [counsel] were far fewer than with any other attorney I have worked with, including attorneys handling criminal matters of far less gravity than the Ryan case." (Ex. 3, pp. 6-7).

Pre-trial Negotiations: Prior to trial, the state gave Ryan the opportunity to plead guilty to a single, non-Measure 11 offense, i.e., an offense that did not carry a lengthy, mandatory minimum sentence (petition for post-conviction relief, paragraph 6C.). Ryan indicated to trial counsel that he did not wish to accept the offer because he had not done anything wrong. Based on Ryan's position

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[5] The exhibits cited in this petition are taken from the post-conviction proceeding as follows: The Affidavit of Judge Aaron Brown (Ex. 2); the deposition of Judge Brown (Ex. 5); the Affidavit of investigator Stephen Taylor (Ex. 3); the deposition of Stephen Taylor (Ex. 6); the Affidavit of Laura Disciascio (Ex. 4); the transcript of proceedings in the trial court (Tr.); and the deposition of petitioner Danny Ryan (Ex. 7).

and his own assessment of the case, counsel simply rejected the state's offer. He never conducted the kind of assessment required by Oregon's plea negotiation statutes, Oregon Revised Statute 133.425, *et seq*. Furthermore, counsel never made a counter-offer of any sort. More specifically, he failed to explore the possibility of a no contest plea, which would have been consistent with Ryan's claim of innocence while giving him an assured, non-Measure 11 outcome. That fact is particularly significant because Ryan testified in the post-conviction proceedings that he would have accepted a no contest plea if such an offer had been made (Ex. 7, p. 7).

***Witness Preparation*:** According to his trial assistant, trial counsel did virtually nothing in the way of witness preparation (Ex. 4, p. 4). For example, investigator Taylor testified that the only preparation trial counsel did with him consisted of a ten-minute conversation in the courthouse hall prior to Taylor taking the stand (Ex. 3, p. 7). As a result, Taylor was able to contribute nothing to the defense case (see below).

***Pre-trial Motions*:** Although counsel made a number of errors in relation to pre-trial motions, the most striking illustration of trial counsel's lack of preparation and training was provided by his handling of the motion filed by prior counsel that challenged the application of Ballot Measure 40 to Ryan's case. According to the trial judge, "[w]hen we started talking about * * * Measure 40, [trial counsel] didn't seem to know anything about what was going on." (Ex. 5, p. 14). More specifically, trial counsel was not even aware of whether the motion had been heard. (Ex. 5, p. 16). As the trial judge put it, counsel's ignorance concerning the status of the motion was "such a blaring [mistake, it was] like sunlight coming out of dark

clouds." (Ex. 5, p. 112). When counsel learned that the Measure 40 motion had not been heard, he indicated that he wished to "reserve argument" until the time of sentencing. (Tr. 43). However, Measure 40 covered virtually every phase of a criminal trial. Trial counsel's request to "reserve argument" until the conclusion of the trial irrefutably demonstrates that he knew nothing about the substantive content of that Measure. Ryan candidly submits that this fact, standing alone, irrefutably establishes that trial counsel lacked the expertise needed to handle a criminal case.

***Voir Dire*:** Trial counsel's lack of competence was again displayed in his handling of *voir dire*. In fact, counsel displayed such ineptitude in his questioning that the trial judge had to instruct him on the proper type of questions to ask:

> "[THE COURT:] Now, you do this please. Inquire of this jury how they feel about this type of case, where they were born, if you want to, how long they lived in Oregon * * * and what's their experience in life. Find out what their qualifications are."

Tr. 89.

The most serious error in *voir dire*, however, was trial counsel's failure to challenge a prospective juror who indicated that she would automatically believe an allegation of rape or sodomy. The relevant colloquy was as follows:

> "MR. RUSSELL [TRIAL COUNSEL]: Okay. If somebody says – if somebody says – if somebody makes accusation, 'I was raped or sodomized,' do we believe them automatically? We do?